

## Notes

# The Supreme Court's Decision in *Cheek*: Does It Encourage Willful Tax Evasion?

*Cheek v. United States*<sup>1</sup>

### I. INTRODUCTION

The general rule in criminal proceedings is that ignorance of the law or a misunderstanding of the applicability of the law is no excuse.<sup>2</sup> This rule is based on a common law presumption that the law is "definite and knowable" by everyone.<sup>3</sup> Based on the magnitude and complexity of modern tax law, however, special treatment has been accorded to criminal tax offenders, including a bona fide ignorance of the law defense.<sup>4</sup> Yet, disagreement arises as to whether the ignorance or misunderstanding defense should be scrutinized under a subjective or objective standard.<sup>5</sup> With the exception of the United States Seventh Circuit Court of Appeals, the circuits have held that a subjective standard should be applied to defendants' asserted belief that they were ignorant of, or misunderstood, the law.<sup>6</sup> In *Cheek v. United States*, the United States Supreme Court, by a six to two vote, upheld this majority position.<sup>7</sup>

### II. FACTS AND HOLDING

Petitioner John L. Cheek has been employed by American Airlines as a pilot since 1973.<sup>8</sup> Cheek properly filed his income tax returns from 1969 to 1979.<sup>9</sup> With the exception of a frivolous return filed in 1982, he did not file tax returns from 1980 to 1986.<sup>10</sup> During this period, Cheek initiated several

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1. 111 S. Ct. 604 (1991).

2. See *infra* notes 132-33 and accompanying text.

3. See *infra* note 57 and accompanying text.

4. See *infra* notes 67 & 136 and accompanying text.

5. See *infra* notes 108-09 and accompanying text.

6. *Id.*

7. See *infra* note 146 and accompanying text.

8. *United States v. Cheek*, 882 F.2d 1263, 1265 (7th Cir. 1989) [hereinafter *Cheek I*], *cert. granted*, 110 S. Ct. 1108 (1990), *vacated*, 111 S. Ct. 604 (1991).

9. *Cheek v. United States*, 111 S. Ct. 604, 606 (1991) [hereinafter *Cheek II*].

10. *Cheek I*, 882 F.2d at 1265. Additionally, from January, 1980, to January,

civil suits against American Airlines and the Internal Revenue Service (the "Service").<sup>11</sup> The suit against American alleged wrongful withholding of taxes from his wages.<sup>12</sup> In the suits against the Service, Cheek asserted various reasons for not being required to pay any income tax, most of which were rejected or discharged for being frivolous.<sup>13</sup> As a result of his failure to file tax returns, Cheek was indicted for ten violations of federal income tax law in the United States District Court for the Northern District of Illinois.<sup>14</sup> He was charged with three counts of willfully attempting to evade income tax for the years 1980, 1981, and 1983, in violation of 26 U.S.C. section 7201.<sup>15</sup> In addition, Cheek was charged with six counts of willfully failing to file a federal income tax return for the years 1980, 1981, and 1983 through 1986, in violation of 26 U.S.C. section 7203.<sup>16</sup>

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1981, Cheek filed frivolous W-4 forms claiming a rising number of withholding allowances. These allowances eventually reached as many as sixty. He subsequently claimed a complete exemption from taxation on his W-4 forms. *Id.*

11. *Id.* at 1265.

12. *Id.* Cheek, along with another American Airlines employee, filed this suit in March, 1982. *Cheek II*, 111 S. Ct. at 607.

13. *Cheek II*, 111 S. Ct. at 607 n.3. Cheek's suit against the Service in the Tax Court in April, 1982, asserted that he was not a taxable person under the Internal Revenue Code, that his wages were not income, and several other analogous claims. Along with four others, Cheek filed a suit against the United States and the Commissioner of the Service in the federal district court stating that withholding taxes from their wages violated the sixteenth amendment. In 1985, Cheek filed claims with the Service seeking refunds for taxes withheld from his earnings in 1983 and 1984. When these claims were disallowed, he brought suit in the United States District Court for the Northern District of Illinois alleging that withholding was "an unconstitutional taking of his property" and again that his wages were not income. Dismissing the case as frivolous, the district court assessed \$1,500 in attorney fees and costs and a sanction, under Rule 11 of the Federal Rules of Civil Procedure, in the amount of \$10,000. This sanction was subsequently reduced on appeal to \$5,000 by the United States Court of Appeals, Seventh Circuit. *Cheek II*, 111 S. Ct. at 607 n.3. *See also* Cheek v. Doe, 828 F.2d 395 (7th Cir.), *cert. denied*, 484 U.S. 955 (1987).

14. *Cheek II*, 111 S. Ct. at 606.

15. *Id.* at 606-07. The statute reads:

§ 7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

I.R.C. § 7201 (1988).

16. *Cheek II*, 111 S. Ct. at 606. The statute reads:

Cheek represented himself at trial and, during the course of his testimony, admitted that he did not file tax returns during the years in dispute.<sup>17</sup> He testified that in early 1978 he began attending seminars sponsored by an association that promoted among other things, the unconstitutionality of the federal tax system.<sup>18</sup> As his defense, Cheek claimed that, in addition to his own research, the indoctrination he received from this group firmly established his belief that the tax laws were unconstitutionally enforced, thus making his actions from 1980 to 1986 lawful.<sup>19</sup> Based on this belief, Cheek argued that he could not have acted with the willfulness required for the various offenses for which he was accused.<sup>20</sup>

While administering its instructions, the district court explained to the jury that "willfulness" required the government to prove "the voluntary and intentional violation of a known legal duty."<sup>21</sup> The court forewarned that merely showing mistake, ignorance, or negligence were not sufficient to prove willfulness.<sup>22</sup> "An objectively reasonable good-faith misunderstanding of the law," advised the court, "would negate willfulness but mere disagreement with the law would not."<sup>23</sup> In commenting on Cheek's beliefs about the income tax system, the court instructed the jury that if it found that Cheek "honestly and reasonably believed that he was not required to pay income taxes or to

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§ 7203. Willful failure to file return, supply information or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. . . .

I.R.C. § 7203 (West Supp. 1991).

17. *Cheek II*, 111 S. Ct. at 607.

18. Included as speakers at those meetings were attorneys who allegedly gave professional opinions about the "invalidity of the federal income tax laws." *Id.* Cheek introduced into evidence a letter from a lawyer asserting that the sixteenth amendment did not authorize a tax on wages and salaries but only on gain or profit. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 607-08.

23. *Id.* at 608.

file tax returns," the jury should return with a verdict of not guilty.<sup>24</sup> After deliberating for several hours, the jury sent out a note to the judge stating:<sup>25</sup>

We have a basic disagreement between some of us as to if Mr. Cheek honestly and reasonably believed that he was not required to pay income taxes . . . Page 32 [the relevant jury instruction] discusses good faith misunderstanding and disagreement. Is there any clarification you can give us on this point?<sup>26</sup>

In response, the district judge issued a supplemental instruction stating that an individual's opinion that the tax laws are violative of his constitutional rights is not a good faith misunderstanding of the law.<sup>27</sup> In addition, the instruction stipulated that a personal disagreement with the tax collection system and policies of the government does not establish a good faith misunderstanding of the law.<sup>28</sup> Despite the seemingly dispositive nature of this instruction, the jury sent out another note at the end of the first day reaffirming its inability to reach a verdict because of disagreement over whether the petitioner honestly and reasonably believed that he was not required to pay income tax.<sup>29</sup> Upon resuming their deliberations, the jury was given an additional instruction by the judge which stated:

"[A]n honest but unreasonable belief is not a defense and does not negate willfulness," and that "[a]dvice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense."<sup>30</sup>

After two-and-a-half more hours of deliberation, the jury returned with a verdict of guilty on all counts.<sup>31</sup>

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24. *Id.*

25. This was the second note sent out to the judge. The first note had requested a transcript of Cheek's testimony in which he discussed his beliefs. *Cheek I*, 882 F.2d at 1266.

26. *Cheek II*, 111 S. Ct. at 608.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* (citation omitted).

31. *Id.* The jury included several notes with the verdict. One note, signed by all 12 jurors, stated that they found the defendant guilty on all counts but that some jurors wished to express their personal opinions, which were "not meant to affect in any way their verdict of guilty." *Id.* The notes were "a complaint against the narrow and hard expression under the constraints of the law." *Cheek I*, 882 F.2d at 1266-67. At least

On appeal, Cheek argued that the district court erred by instructing the jury that only "an objectively reasonable misunderstanding of the law negates the statutory willfulness requirement."<sup>32</sup> The Seventh Circuit Court of Appeals rejected his argument and affirmed the convictions.<sup>33</sup> The Seventh Circuit relied on prior cases that had clearly indicated that a good faith misunderstanding of the law must be objectively reasonable to negate the willfulness requirement.<sup>34</sup> Referring to a prior decision, the court restated its holding that certain particular beliefs, including beliefs that tax laws are unconstitutional and that wages are not income, would never be objectively reasonable.<sup>35</sup>

On further appeal, the United States Supreme Court reversed the Seventh Circuit and remanded the case for further proceedings consistent with its decision.<sup>36</sup> The Supreme Court held that a defendant's beliefs about the validity or unconstitutionality of tax statutes are irrelevant to the issue of willfulness and therefore any instruction to disregard them would be proper.<sup>37</sup> A defendant's good faith misunderstanding of the law or good faith belief that

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two of the notes expressed opinions of individual jurors that the petitioner "sincerely believed in his cause even though his beliefs might have been unreasonable." *Cheek II*, 111 S. Ct. at 608 n.6.

32. *Cheek II*, 111 S. Ct. at 608.

33. *Id.* See *Cheek I*, 882 F.2d at 1263.

34. *Cheek II*, 111 S. Ct. at 608-09. See, e.g., *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987).

35. *Cheek II*, 111 S. Ct. at 609. The Seventh Circuit, in its opinion, noted that: [T]he following beliefs, which are stock arguments of the tax protester movement, have not been, nor ever will be, considered "objectively reasonable" in this circuit:

- (1) the belief that the sixteenth amendment to the constitution was improperly ratified and therefore never came into being;
- (2) the belief that the sixteenth amendment is unconstitutional generally;
- (3) the belief that the income tax violates the takings clause of the fifth amendment;
- (4) the belief that the tax laws are unconstitutional;
- (5) the belief that wages are not income and therefore are not subject to federal income tax laws;
- (6) the belief that filing a tax return violates the privilege against self-incrimination; and
- (7) the belief that Federal Reserve Notes do not constitute cash or income.

*Cheek I*, 882 F.2d at 1268-69 n.2.

36. *Cheek II*, 111 S. Ct. at 613.

37. *Id.*

he is not violating the law will negate willfulness, however, regardless of whether or not it is objectively reasonable.<sup>38</sup>

### III. LEGAL BACKGROUND

The fundamental basis of the federal tax system is voluntary taxpayer compliance with tax laws. Voluntary compliance implies a fictitious environment, free from the watchful and pervading view of a fierce tax collector.<sup>39</sup> It creates an illusion of every citizen faithfully filing tax returns and honestly reporting taxable income as part of a duty to the community. Although this could be the scenario for a small segment of the taxpaying society, voluntary compliance is more realistically achieved by a fear of the fierce tax collector who scrutinizes a taxpayer's every move, ready to grab any transgressor.<sup>40</sup> Voluntary compliance is a primary objective of the Internal Revenue Service, which seeks to achieve such compliance by increasing simplicity and providing guidance to taxpayers.<sup>41</sup> If voluntary compliance is so essential to revenue collection, then ignorance of those laws that require the payment of taxes should not be a defense to crimes involving the tax laws.<sup>42</sup> But, in fact, ignorance of the law is a defense to federal tax crimes as they are currently written and interpreted.<sup>43</sup> This is due, in part, to the word "*willfully*," which is contained in the criminal penalty sections of the Internal Revenue Code.<sup>44</sup> From this requirement of willfulness emerges the ignorance of the law defense. As the instant decision postulates, taxpayers cannot "*willfully*" evade income tax if they have an honest and good faith belief that they are not required by law to file tax returns.<sup>45</sup> This good faith defense to the willfulness requirement raises the primary issue of whether taxpayers' good faith beliefs must be reasonable.<sup>46</sup> In addition to providing a basis for the ignorance of the law defense, the meaning of the term "*willfully*" has long plagued those courts attempting to apply the standard to criminal sanctions in federal tax cases.

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38. *Id.* at 605.

39. Yochum, *Ignorance of the Law Is No Excuse Except for Tax Crimes*, 27 DUQ. L. REV. 221, 223 (1989).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. I.R.C. § 7201 (1988); I.R.C. § 7203 (West Supp. 1991). See *supra* notes 15-16 for the text of these statutes.

45. *Cheek I*, 882 F.2d at 1270.

46. *Cheek II*, 111 S. Ct. at 611.

### A. Historical Criminal Law Analysis

Ignorance or mistake of law is the area of substantive criminal law that has been surrounded by the most confusion.<sup>47</sup> The frequently erroneous assumption is that ignorance or mistake of law is not a defense, but that a mistake of fact is a defense.<sup>48</sup> In fact, ignorance of the law is a defense to a criminal charge under certain circumstances. This confusion is further compounded by the fact that "ignorance of the law" really encompasses two situations, each of which calls for different analyses and produces different results. The first situation occurs where defendants lack the mental state<sup>49</sup> required for the commission of the crime and therefore have a valid defense.<sup>50</sup> The second situation occurs where defendants have the required mental state but claim they were unaware that such conduct was prohibited by the criminal law. This ordinarily is not recognized as a defense.<sup>51</sup> For example, defendants do not commit the crime of larceny if, because of mistaken understanding of the property laws, they believed that the property belonged to them.<sup>52</sup> The crime would be committed, however, if the defendant believed it was lawful to take certain property belonging to others because it was a community custom.<sup>53</sup> The requisite mental state needed for the crime of larceny—intent to steal or take property belonging to another—is not present in the first example because defendants believed that the property belonged to them and therefore could not have intended to take another person's property. The intent to steal, however, is present in the second example because they did intend to take property belonging to someone else. As one commentator has noted, "[i]t is not the intent to violate the law but the intentional doing of the act which is a violation of the law."<sup>54</sup> As illustrated by these examples, the basic rule is that "ignorance or mistake of the law is

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47. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 5.1(a) (2d ed. 1986).

48. *Id.*

49. Generally, crimes have two components: the *actus reus* and the *mens rea*. The *actus reus* is a voluntary act or an omission by a defendant. J. DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.01[A] (1987). The "mental state provided in the definition of an offense" is commonly referred to as *mens rea*. For example, murder is defined by a state as "the intentional killing of a human being by another human being." The *actus reus* of the offense is "the killing of a human being by another human being." The *mens rea* of the offense is "intentional" and therefore the defendant is not guilty of the crime unless he committed the *actus reus* intentionally. *Id.* § 10.02[c].

50. W. LAFAVE & A. SCOTT, *supra* note 47, § 5.1(d).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* (citing *State v. Downs*, 116 N.C. 1064, 21 S.E. 689 (1895)).

a defense when it negatives the existence of a mental state essential to the crime charged."<sup>55</sup> Therefore, pure ignorance of the law (defendants are unaware of the statute prohibiting their conduct) and mistake of the law (defendants have mistakenly concluded that the relevant statute does not apply to their conduct) are not normally defenses to a criminal charge because they do not negate the requisite mental state accompanying the act.<sup>56</sup>

The nonrecognition of this defense is rooted in an early theory that the law is "definite and knowable" and therefore there is a presumption that everyone knows the law.<sup>57</sup> The benefits and detriments of such a presumption have been continually debated through the years. In a historical context, it was once possible for the average citizen to actually know the law when it was simple and limited in scope. But this is unrealistic with today's complex criminal laws.<sup>58</sup> If all defendants were allowed to use an ignorance of the law defense, then finders of fact would be consistently confronted with an issue they could not readily resolve.<sup>59</sup> It is argued that this defense, if allowed, would create a shield for the guilty because the defendants' ignorance claims would be difficult to repudiate.<sup>60</sup> Additionally, if defendants were actually ignorant of the law, an extensive analysis would be necessary to determine whether or not the defendants were at fault in not knowing the law.<sup>61</sup> The balancing of defendants' and society's interests cuts against recognizing an ignorance of the law defense. Although the result may be harsh on defendants who were reasonably ignorant of the law, the interest of the general public far outweighs that of the individual.<sup>62</sup> By convicting defendants of the crimes for which they claim an ignorance defense, the existence of these laws is brought home to the public and helps to establish them in the community.<sup>63</sup>

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55. W. LAFAYE & A. SCOTT, *supra* note 47, § 5.1(a). In this regard, the Model Penal Code states:

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or

(b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

MODEL PENAL CODE § 2.04(1) (1991).

56. W. LAFAYE & A. SCOTT, *supra* note 47, § 5.1(d).

57. *Id.* (citing *Weeks v. State*, 24 Ala. App. 198, 132 So. 870 (1931)).

58. W. LAFAYE & A. SCOTT, *supra* note 47, § 5.1(d).

59. *Id.*

60. *Id.* (citing *People v. O'Brien*, 96 Cal. 171, 31 P. 45 (1892)).

61. W. LAFAYE & A. SCOTT, *supra* note 47, § 5.1(d).

62. *Id.*

63. *Id.*



Despite the balancing of the public interest, a "good faith" ignorance of the law is a recognized defense in the area of tax crimes.<sup>64</sup> The Supreme Court clearly supports this good faith defense, as evidenced by the landmark case of *United States v. Murdock*,<sup>65</sup> where it was recognized that:

Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.<sup>66</sup>

The *Murdock* decision and its interpretation of the statutory term "willfully" created an exception to the traditional rule and began special treatment for criminal tax offenses because of the complexity of tax laws.<sup>67</sup>

### *B. Federal Tax Crimes and the "Willfulness" Requirement*

#### 1. Statutory Overview

The belief that the stigma of a criminal conviction and imprisonment will help preserve a tax system based on voluntary compliance is fundamental to the criminal tax enforcement program.<sup>68</sup> The main criminal sanction utilized to attain that conviction is section 7201, which provides that any person "who willfully attempts in any manner to evade or defeat any tax" is guilty of a felony and upon conviction can be subject to fines of up to \$100,000 and imprisonment of up to five years.<sup>69</sup> The Supreme Court, in *Spies v. United States*,<sup>70</sup> labeled this section as "the capstone of a system of sanctions" that were intended to "induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency."<sup>71</sup> In *Sansone v. United States*,<sup>72</sup> the Supreme Court delineated the elements of section 7201 as willfulness, a tax deficiency, and an

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64. See *United States v. Flitcraft*, 803 F.2d 184, 186-87 (5th Cir. 1986), *reh'g denied*, 863 F.2d 342 (5th Cir.), *cert denied*, 490 U.S. 1080 (1989) (discusses several cases which address this "good faith" defense).

65. 290 U.S. 389 (1933).

66. *Id.* at 396.

67. *Cheek II*, 111 S. Ct. at 609.

68. Davis, *Recent Developments in Criminal Tax Matters*, 47 INST. ON FED. TAX'N § 46.01[1] (1989).

69. I.R.C. § 7201 (1990). See *supra* note 15 for the full text of this statute.

70. 317 U.S. 492 (1943).

71. *Id.* at 497.

72. 380 U.S. 343 (1965).

affirmative act that constitutes an evasion or an attempted evasion of the tax.<sup>73</sup>

Another criminal sanction can be imposed under section 7203, which criminalizes the willful failure to pay a tax or file a tax return.<sup>74</sup> Violation of this section is a misdemeanor with fines of up to \$25,000 and a maximum of one year of imprisonment.<sup>75</sup> A section 7203 misdemeanor requires proof that (1) a legal duty to file a tax return existed; (2) there was a failure to do so; and (3) the defendant acted willfully.<sup>76</sup> The purpose of section 7203 is to encompass omissions that would not be sufficient for a conviction under section 7201.<sup>77</sup> A failure to file without more, such as an affirmative act, will not sustain a section 7201 conviction.<sup>78</sup>

The most widely used criminal sanction is 26 U.S.C. section 7206, which makes it a crime to "[w]illfully [make] and [subscribe] any return . . . or other document which contains or is verified by a written declaration that it is under penalties of perjury and he does not believe to be true and correct as to every material matter."<sup>79</sup> Violations of section 7206 are felonies, and upon conviction can result in fines of up to \$100,000 and imprisonment of up to three years.<sup>80</sup>

The pivotal element of each of these criminal sanctions is willfulness.<sup>81</sup> Congress included a "willfulness" element in the criminal tax statutes to implement a "pervasive intent . . . to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers."<sup>82</sup> In its attempt to separate these two types of taxpayers, however, Congress has succeeded in adding confusion to court decisions attempting to interpret the "willfulness" element.

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73. *Id.* at 351.

74. I.R.C. § 7203 (West Supp. 1991). See *supra* note 16 for the full text of this statute.

75. *Id.*

76. *United States v. Gorman*, 393 F.2d 209, 213 (7th Cir.), *cert. denied*, 393 U.S. 832 (1968).

77. Peterson, *Tax fraud: What steps the attorney can take to defend his client against it*, 5 TAXATION FOR LAWYERS 244, 244 (1977).

78. *Spies*, 317 U.S. at 499.

79. *Id.* See I.R.C. § 7206 (1988).

80. I.R.C. § 7206(1) (1988).

81. Peterson, *supra* note 77, at 244.

82. Note, *Criminal Liability for Willful Evasion of an Uncertain Tax*, 81 COLUM. L. REV. 1348, 1354 (1981) (quoting *Spies*, 317 U.S. at 497-98).

## 2. The "Willfulness" Requirement

The first case to construe this distinguishing element was *United States v. Murdock*.<sup>83</sup> In *Murdock*, the Supreme Court held that a taxpayer in a criminal prosecution under the predecessor to 26 U.S.C. section 7205<sup>84</sup> was entitled to a jury instruction stating that the jury, in ascertaining willfulness, could consider whether a refusal to comply was "in good faith and based upon his actual belief."<sup>85</sup> The Court noted that the word "willfully" often signifies an act that is "intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose . . . ,"<sup>86</sup> or with "an evil motive . . . ."<sup>87</sup>

In *Spies v. United States*, the Supreme Court reviewed a tax evasion conviction under the predecessor to section 7201. The defendant claimed psychological disturbance as a defense for his failure to file a return and pay tax.<sup>88</sup> The Court rejected the trial court's interpretation of the term "willfully" as "voluntarily" because it failed to give effect to an inferred congressional intent that was evidenced by classifying certain crimes as felonies and others as misdemeanors.<sup>89</sup> The Court held that the difference between the two offenses—a willful failure to pay tax when due under section 7203 and a willful attempt to evade or defeat taxes under section 7201—was that the latter felony involves "some willful commission in addition to the willful omissions that make up the list of misdemeanors."<sup>90</sup> In reference to what affirmative action would constitute a willful attempt, the Court stated that an inference could be made from the following conduct:

keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.<sup>91</sup>

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83. 290 U.S. 389, 393 (1933).

84. I.R.C. § 7205 (West Supp. 1991) (addresses the fraudulent withholding exemption certificate or failure to supply information).

85. Yochum, *supra* note 39, at 224 (quoting *United States v. Murdock*, 290 U.S. 389, 393 (1933)).

86. *Murdock*, 290 U.S. at 394.

87. *Id.* at 395.

88. *Spies*, 317 U.S. at 493.

89. *Id.* at 497.

90. *Id.* at 499.

91. *Id.*

*Spies*, however, left some confusion as to whether the word "willfully" was to be applied uniformly, or in varying degrees depending on the tax felonies and misdemeanors set forth in sections 7201-7207.<sup>92</sup>

In *United States v. Bishop*,<sup>93</sup> the Supreme Court attempted to clarify the application of the term "willfully." The Court held that Congress distinguished the misdemeanor and felony statutes in ways that did not turn on the meaning of the word "willfully".<sup>94</sup> The Court stated that the distinction was founded on "the additional misconduct which is essential to the violation of the felony statute . . . and not in the quality of willfulness which characterizes the wrongdoing."<sup>95</sup>

The Supreme Court abandoned the evil motive characterization of "willfully" in *United States v. Pomponio*.<sup>96</sup> The Court held that the term "willful" as used in section 7206, which makes it a felony to willfully file a false income tax return, simply meant a "voluntary, intentional violation of a known legal duty."<sup>97</sup> Additionally, there was no requirement to find an evil motive beyond a specific intent to violate the law.<sup>98</sup>

### 3. The Good-Faith Defense: Subjective Versus Objective Standard

Despite the Court's clarification in *Pomponio*, differences among the circuits arose over the application of the "known legal duty" or knowledge requirement. Particularly, the courts differed over whether a good faith ignorance of the law had to be objectively reasonable to be a defense.<sup>99</sup> In *United States v. Aitken*,<sup>100</sup> the First Circuit Court of Appeals contemplated whether willfulness meant a subjective intent to disobey the law or "merely the absence of what a jury would consider an objectively reasonable ground for failure to comply."<sup>101</sup> The First Circuit rejected the trial court's jury instruction that a mistaken belief must be reasonably held and ruled that willfulness must be evaluated subjectively.<sup>102</sup> As one commentator poignantly stated, the outrageousness of the belief that an exchange of time for

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92. See *United States v. Bishop*, 412 U.S. 346, 356, 360 n.8 (1973).

93. 412 U.S. 346 (1973).

94. *Id.* at 358.

95. *Id.* at 358-59 (quoting *United States v. Vitiello*, 363 F.2d 240, 243 (3d Cir. 1966)).

96. 429 U.S. 10 (1976).

97. *Id.* at 12.

98. *Id.*

99. Yochum, *supra* note 39, at 229.

100. 755 F.2d 188 (1st Cir. 1985).

101. *Id.* at 189.

102. *Id.* at 192.

money was not income "should certainly influence the jury's determination as to whether the belief is actually held [by the taxpayer], but if held, the taxpayer is innocent."<sup>103</sup>

Similarly, the Fifth Circuit Court of Appeals reversed a taxpayer's conviction in *United States v. Burton*<sup>104</sup> because the trial court instructed the jury that the defendant's belief that wages were not income was no defense.<sup>105</sup> The Fifth Circuit sympathized with trial judges who believed that many defendants were able to escape justice by using shrewd arguments that confused juries about the actual state of the law.<sup>106</sup> The court hoped, however, that the outrageousness of the defendant's alleged belief would influence the jury when considering the defendant's credibility.<sup>107</sup>

Disregarding the majority of other circuits that have held that a subjective standard is necessary in evaluating willfulness,<sup>108</sup> the Seventh Circuit adopted an "objectively reasonable" standard in *United States v. Moore*.<sup>109</sup> In *Moore*, a tax protestor who filed a return with only his name, address, and social security number, was charged with failure to file.<sup>110</sup> The protestor claimed that Federal Reserve Notes were not legal tender or money and therefore were not taxable as income.<sup>111</sup> The trial court jury instructions defined willfully as a violation of a known legal duty and then stated that "the question is, did he reasonably believe" the returns were adequate or properly filed.<sup>112</sup> The Seventh Circuit upheld the instruction, although deeming it unnecessary, and stated that "the mistake of law defense is extremely limited and the mistake must be objectively reasonable."<sup>113</sup>

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103. Yochum, *supra* note 39, at 228.

104. 737 F.2d 439 (5th Cir. 1984).

105. *Id.* at 441.

106. *Id.* at 442-43.

107. *Id.* at 443.

108. See *United States v. Whiteside*, 810 F.2d 1306, 1310-11 (5th Cir. 1987); *United States v. Aitken*, 755 F.2d 188, 192-93 (1st Cir. 1985); *United States v. Phillips*, 775 F.2d 262, 263-64 (10th Cir. 1985); *United States v. Burton*, 737 F.2d 439, 441-42 (5th Cir. 1984); *United States v. Kraeger*, 711 F.2d 6, 7 (2d Cir. 1983); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 97 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983); *Cooley v. United States*, 501 F.2d 1249, 1253 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975); *Mann v. United States*, 319 F.2d 404, 409-10 (5th Cir. 1963), *cert. denied*, 375 U.S. 986 (1964); *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir.), *cert. denied*, 351 U.S. 969 (1956); *Battjes v. United States*, 172 F.2d 1, 4 (6th Cir. 1949).

109. 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 619 (1981).

110. *Id.* at 831.

111. *Id.* at 833.

112. *Id.*

113. *Id.*

In *United States v. Phillips*,<sup>114</sup> the Tenth Circuit Court of Appeals explicitly rejected the *Moore* decision by holding that a subjective rather than an objective standard should be applied in assessing a defendant's claimed belief that he was not required under the law to file a return because wages were not income.<sup>115</sup> Despite *Phillips'* criticism of *Moore*, the Seventh Circuit held steadfast to its objective standard in its subsequent decision of *United States v. Foster*.<sup>116</sup> The court held that in proving willfulness the government was only required to show that the defendant intentionally violated a known legal duty, without demonstrating any bad purpose on his part, and that any mistake on the defendant's part must be "objectively reasonable."<sup>117</sup>

Discussions about the Seventh Circuit's position that an objective standard is necessary to establish lack of willfulness have concluded that the court was simply wrong.<sup>118</sup> As defined by the Supreme Court, these criminal tax offenses require an element of knowledge of the legal duty.<sup>119</sup> Whether defendants' beliefs of the legality of their actions are correct or incorrect, or reasonable or unreasonable, are irrelevant to determining willfulness.<sup>120</sup> The only issue is whether or not those beliefs were in fact held by the defendants.<sup>121</sup> An explicit disagreement with the law, however, is not a defense, nor is a mistake or ignorance of the law.<sup>122</sup> Taxpayers cannot use a belief that taxes are being collected from them for an improper purpose as a defense to tax evasion or failure to file a return.<sup>123</sup>

In *United States v. House*,<sup>124</sup> the United States District Court for the Western District of Michigan held that a good faith belief that tax laws are unconstitutional does not negate the element of willfulness.<sup>125</sup> The court

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114. 775 F.2d 262 (10th Cir. 1985).

115. *Id.* at 264.

116. 789 F.2d 457 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986); *see also Cheek I*, 882 F.2d at 1267; *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987).

117. *United States v. Foster*, 789 F.2d 457, 461 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986).

118. Yochum, *supra* note 39, at 230.

119. *See supra* note 97 and accompanying text.

120. *See Note, supra* note 82, at 1356.

121. *See id.*

122. *See Yochum, supra* note 39, at 230.

123. *Id.*

124. 617 F. Supp. 232 (W.D. Mich. 1985), *aff'd by order*, 787 F.2d 593 (6th Cir. 1986).

125. *Id.* at 234. The court additionally held that a good faith misunderstanding of the law's requirement negates the element of willfulness. *Id.* at 234. *See also United States v. Harrold*, 796 F.2d 1275 (10th Cir. 1986), *cert. denied*, 479 U.S. 1037

explained that it was "immediately apparent that the premise of these decisions [cases from other circuits with similar holdings] is that in each case the defendant *knew* of the tax law and was not uncertain about the duty Congress meant to impose."<sup>126</sup> The court, in agreement with the government, recognized that there was a "difference between willful defiance of a statute and ignorance of a statute's existence or meaning."<sup>127</sup> Nonrecognition of the unconstitutionality defense distinguishes citizens who simply choose not to adhere to a known legal duty from those who act based on ignorance or a misunderstanding of the law.<sup>128</sup> The court ruled that a jury could be instructed to "draw an inference that the defendant was aware of his legal obligation from acts taken in protest to or to express a political view, even though made with conviction and sincerity of purpose."<sup>129</sup> Therefore, the distinction between a good faith disagreement with the law, which is not a defense, and a good faith misunderstanding or ignorance of the law, which is a defense, is crucial to defendants in attempting to negate willfulness.

Despite the ostensible fact that no other circuits had adopted its objectively reasonable standard as to the ignorance or misunderstanding of the law defense, the Seventh Circuit continued its application of this standard in

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(1987) (upheld conviction of taxpayer who filed no returns on grounds wages were not taxable; good faith disagreement with the tax laws not a defense; instruction on good faith misunderstanding as defense is appropriate only if there is evidence from which jury could reasonably find defendant misunderstood what law required of him); *United States v. Payne*, 800 F.2d 227 (10th Cir. 1986) (belief tax laws violate constitutional rights is not good faith misunderstanding); *United States v. Mueller*, 778 F.2d 539 (9th Cir. 1985); *United States v. Gleason*, 726 F.2d 385 (8th Cir. 1984); *United States v. Kraeger*, 711 F.2d 6 (2d Cir. 1983); *United States v. Romero*, 640 F.2d 1014 (9th Cir. 1981); *United States v. Jones*, 628 F.2d 402 (5th Cir. 1980), *cert. denied*, 450 U.S. 967 (1981) (good faith belief in unconstitutionality of Federal Reserve System did not constitute legal defense to willful failure to file); *United States v. Crowhurst*, 629 F.2d 1297, 1298 (9th Cir.), *cert. denied*, 449 U.S. 1021 (1980) (defendant's disagreement with Internal Revenue Service's definition of "gross income" did not entitle him to violate the law by failing to file proper return); *United States v. Karsky*, 610 F.2d 548 (8th Cir. 1979), *cert. denied*, 444 U.S. 1092 (1980) (good faith disagreement with the law does not negate willfulness). *See also supra* note 37 and accompanying text.

126. *United States v. House*, 617 F. Supp. 232, 234 (W.D. Mich. 1985), *aff'd by order*, 787 F.2d 593 (6th Cir. 1986) (quoting *Burton*, 737 F.2d at 442-43).

127. *House*, 617 F. Supp. at 234.

128. *Id.*

129. *Id.*

*United States v. Cheek*,<sup>130</sup> and was reversed by the United States Supreme Court.<sup>131</sup>

#### IV. INSTANT DECISION

The Court in *Cheek* began its discussion by recognizing the general rule that ignorance or mistake of law is not a defense to a criminal prosecution.<sup>132</sup> The majority restated the common law presumption that every person knows the law, while recognizing that the magnitude of statutes and regulations have complicated attempts by taxpayers to comprehend their tax duties under the law.<sup>133</sup> The Court noted that by requiring an element of specific intent to violate the law for certain tax crimes, Congress has reduced the effect of the common law presumption.<sup>134</sup> The Court mentioned that its interpretation of "willfully" in *Murdock* created an exception to the traditional rule for criminal tax offenses.<sup>135</sup> The complexity of the tax laws is the major reason for this special treatment.<sup>136</sup> In reference to its prior decisions in *Bishop* and *Pomponio*, the Court stated that the standard for statutory willfulness has been conclusively refined from "an act done with a bad purpose"<sup>137</sup> to a "voluntary, intentional violation of a known legal duty."<sup>138</sup>

Willfulness, as interpreted by prior decisions, requires the government to prove that the defendant had a duty imposed by law, knowledge of that duty, and a voluntary and intentional violation of that duty.<sup>139</sup> The Court held that the government satisfies the knowledge element of willfulness by proving that knowledge of the relevant legal duty existed.<sup>140</sup> This burden, however, also requires the government to negate a defendant's good faith claim of ignorance or misunderstanding of the law.<sup>141</sup> The reason for this burden, postulated the Court, is that an individual cannot be cognizant that the law imposes a duty upon him and still be unaware of it, misunderstand it, or

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130. 882 F.2d 1263 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1108 (1990), *vacated*, 111 S. Ct. 604 (1991).

131. *Cheek II*, 111 S. Ct. at 604.

132. *Id.* at 609.

133. *Id.*

134. *Id.*

135. *Id.* See *supra* notes 83-87 and accompanying text.

136. *Cheek II*, 111 S. Ct. at 609.

137. See *supra* note 86 and accompanying text.

138. *Cheek II*, 111 S. Ct. at 610. See *supra* notes 93-98 and accompanying text.

139. *Cheek II*, 111 S. Ct. at 610.

140. *Id.*

141. *Id.* at 610-11.



believe that the duty is nonexistent.<sup>142</sup> The resulting issue was narrowly stated as follows:

Whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.<sup>143</sup>

The Court, in applying this standard, explained that if Cheek declared that he truly believed that the Code did not treat wages as income, and the jury believed him, then the government did not meet its burden of proving willfulness, regardless of the unreasonableness of the belief.<sup>144</sup> The jury, in assigning credibility to the defendant's good faith defense, can consider any admissible evidence from any source revealing the defendant's awareness of his duty.<sup>145</sup> Based on this explanation, the Court explicitly disagreed with the Seventh Circuit's assertion that an alleged good-faith belief be objectively reasonable to be considered by the jury as negating a defendant's awareness of a legal duty.<sup>146</sup> The Court explained that knowledge and belief are customarily questions for the jury or factfinder.<sup>147</sup> If a particular belief is characterized as not objectively reasonable, the analysis becomes a legal one, thus precluding jury consideration.<sup>148</sup> The Court felt that it was plausible for a defendant to be unaware of his duty because of an irrational belief that he did not have one. Therefore, any attempt to prevent jury consideration on this issue could raise serious implications under the seventh amendment jury trial provision.<sup>149</sup> Accordingly, the Court held that it was error to instruct the jury to disregard Cheek's claim that he was not a person required to file a return or pay taxes and that wages were not taxable income, regardless of the ridiculous nature of these claims.<sup>150</sup>

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142. *Id.* at 611.

143. *Id.*

144. *Id.*

145. *Id.* This includes evidence showing the defendant's knowledge of relevant Code sections or regulations, court decisions rejecting his interpretation of the law, authoritative rulings of the Service, or any contents of the personal return forms and accompanying instructions that made it clear that income included wages. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* (citing *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Morissette v. United States*, 342 U.S. 246 (1952)).

150. *Cheek II*, 111 S. Ct. at 611-12.

The Supreme Court also held, however, that the trial court did not err in instructing the jury to disregard Cheek's assertions that tax laws are unconstitutional.<sup>151</sup> The Court regarded Cheek's position as "unsound," not because it failed to be objectively reasonable, but because it lacked support from the *Murdock-Pomponio* line of cases.<sup>152</sup> That line of cases interpreted the willfulness requirement of the Code's criminal provisions to mandate proof of knowledge of the law.<sup>153</sup> The Court then explained the reason for that requirement:

[I]n our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law [and it] is not the purpose of the law to penalize frank differences of opinion or innocent errors made despite the exercise of reasonable care.<sup>154</sup>

The Court felt, however, that claims that certain Code provisions are unconstitutional require different treatment than claims of ignorance or misunderstanding of the law.<sup>155</sup> The Court asserted that claims of unconstitutionality do not arise from unintentional mistakes caused by the complexity of the Code.<sup>156</sup> Rather, these claims expose full awareness of the provisions in dispute and a "studied conclusion, however wrong, that those provisions are invalid and unenforceable."<sup>157</sup>

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151. *Id.* at 612.

152. *Id.*

153. *Id.* See *supra* notes 83-98 and accompanying text.

154. *Cheek II*, 111 S. Ct. at 612 (quoting *Spies v. United States*, 317 U.S. 492, 496 (1943)).

155. *Id.* at 612.

156. *Id.*

157. *Id.* at 612-13. The court's view disregarding unconstitutionality as a defense conforms with all the circuits that have ruled on the issue. These decisions reflect the similar opinion that the claim reveals awareness of the law and a decision not to adhere to it, which cannot rightfully negate the knowledge element of willfulness. See *supra* notes 118-122 and accompanying text.

Justice Scalia, however, who joined only in the judgment of the *Cheek* decision, insisted that, "[i]t is quite impossible to say that a statute which one believes unconstitutional represents a 'known legal duty.'" *Cheek II*, 111 S. Ct. at 614. Regarding the knowledge element of willfulness, Justice Scalia further commented that:

[O]ne may say, as we [Supreme Court] have said until today with respect to the tax statutes, that 'willfully' refers to consciousness of both the act and its illegality. But it seems to me impossible to say that the word refers to consciousness that some legal text is binding, i.e., with the good-faith belief that it is not a valid law.

*Id.*

In applying this view to the present case, the Court determined that Cheek, after paying his taxes for years, attended various seminars and conducted a personal study before concluding that tax laws could not constitutionally impose a duty on him to pay taxes.<sup>158</sup> Therefore, the Court believed that Congress did not contemplate that a taxpayer, like Cheek, could ignore his legal duty and simultaneously refuse to utilize the available statutory mechanisms without risking criminal prosecution.<sup>159</sup> In reference to these statutory mechanisms, the Court reasoned that Cheek was free to pay taxes from year to year, file for a refund, and if denied, offer his claims of unconstitutionality, invalid or otherwise, to the courts.<sup>160</sup> Therefore, the Court decided that Cheek was in no position to claim that his good faith belief regarding the invalidity of the Code provided a defense to willfulness under sections 7201 and 7203.<sup>161</sup> This decision was qualified by stating that Cheek was, of course, free to present his claims and have them adjudicated at the risk of being held wrong.<sup>162</sup>

In conclusion, the Court held that the defendant's opinions regarding the validity of tax statutes were irrelevant to the issue of willfulness, that they did not require jury consideration, and that any instruction to disregard them would be proper.<sup>163</sup> Additionally, the outrageousness or substance of a claim is not consequential.<sup>164</sup> The jury, however, in deciding if the defendant acted willfully, should consider whether the defendant's assertions that wages are not income or that he was not a taxpayer under the Code provisions are objectively reasonable or not.<sup>165</sup>

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158. *Id.*

159. *Id.* at 613.

160. *Id.* (citing I.R.C. § 7422 (1988)). The Court also mentioned that, "without paying the tax, he [Cheek] could have challenged claims of tax deficiencies in the Tax Court, 26 U.S.C. § 6213, with a right to appeal to a higher court if unsuccessful. § 7482(a)(1)." *Cheek II*, 111 S. Ct. at 613.

161. *Cheek II*, 111 S. Ct. at 613.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* In their dissenting opinion, Justices Blackmun and Marshall made the observation that a commercial airline pilot is "presumably . . . a person of at least minimum intellectual competence." *Id.* at 615. They felt that the "objectively reasonable" standard gave the defendant more, rather than less, protection because it provided another obstacle for the prosecution to overcome. *Id.* They concluded by commenting that "[T]his Court's opinion today . . . will encourage taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity. If that ensues . . . we have gone beyond the limits of common sense." *Id.*

## V. COMMENT

The Supreme Court's holding in *Cheek v. United States* is logical from a purely legal viewpoint. As discussed previously, the Supreme Court requires the element of knowledge of a legal duty in criminal tax offenses.<sup>166</sup> This element does not require any lack of knowledge to be reasonable. The only issue is whether or not those beliefs were in fact held by the defendant, correctly or incorrectly, reasonably or unreasonably.<sup>167</sup> Additionally, the *Cheek* decision certainly conforms with the decision of every circuit except the Seventh Circuit.<sup>168</sup> It is important to note that this holding does not relieve taxpayers of their ultimate obligations to pay taxes, even though it does give them a greater ability to escape criminal penalties.

Proponents of the subjective standard argue that even if the defendant's alleged belief is outrageously unreasonable, it "should certainly influence the jury's determination as to whether the belief is actually held" by the taxpayer.<sup>169</sup> Therefore, proponents place their hopes on the fact that the outrageousness of the belief will lead a jury to determine that there was no possible way that the defendant could have held that belief in good faith. Even if the jury is instructed to apply a subjective standard to determine whether the defendant actually held this belief, however, there is no guarantee that the jury will not place themselves in the defendant's shoes and find that there is no way they would have acted similarly in his situation. Likewise, there is no guarantee that a jury consisting of hardworking and taxpaying citizens will not become so personally outraged by a defendant's frivolous beliefs that they will convict the taxpayer under a "I pay so you should pay" standard, regardless of the fact that the defendant might have actually held a bona fide, albeit incorrect, belief. Especially during times of tax increases, citizens who honestly and consistently pay their taxes are not likely to look kindly upon non-taxpaying citizens asserting ridiculous beliefs that wages are not income or that they are not a taxable person under the Internal Revenue Code. In reality, it is possible that an objective standard will be applied irrespective of the Court's instructions. This reality gives more credence to the Seventh Circuit's objectively reasonable standard.

The views of the Seventh Circuit and the dissenters in *Cheek* attempt to achieve a level of practicality beyond the mere defense itself. Their position places even more emphasis on the voluntary compliance objective of the federal tax system. The "objectively reasonable" standard mandates that taxpaying participants have a rational and reasonably based misunderstanding

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166. See *supra* note 119 and accompanying text.

167. See *supra* note 120 and accompanying text.

168. See *supra* note 108 and accompanying text.

169. See *supra* note 103 and accompanying text.

of the tax law before a defense will be available to them. Thus, the "objectively reasonable" standard encourages taxpayers to seek advice on confusing and seemingly unascertainable tax laws rather than to just ignore them because the criminal penalties could be severe if willful noncompliance is found. If an objectively reasonable standard is not imposed, then the prediction of the dissenters in *Cheek* could become a reality. The subjective standard "will encourage taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity."<sup>170</sup> The tax court and other federal district courts could become overrun with taxpayers asserting frivolous beliefs that they are not subject to tax, hoping that a jury would find in their favor. With court dockets clogged to capacity, the Supreme Court's holding in *Cheek* invites even more disgruntled taxpayers to "have their day in court" and assert any frivolous and outrageous proposition as their own, as long as it involves a misunderstanding or ignorance of the law.

In addition to the effect on the court system, *Cheek* will have an impact both inside and outside the area of tax practice. The decision certainly places a greater burden on the Service in criminal tax cases. Not only must the government prove that the defendant had knowledge of a legal duty, but it must also negate any claim of ignorance or misunderstanding of the law that the defendant raises.<sup>171</sup> As noted in one commentary: "By stressing the prosecution's burden to prove that the defendant had the subjective intent to violate the law, the Court reinforced the frequent claim by white-collar defendants that they had no idea that their conduct violated the law."<sup>172</sup>

Therefore, a greater effort must be placed on analyzing the subjective intent or state of the mind of the defendant. Because it is a state of mind, willfulness can be proved only by the defendant's testimony or by circumstantial evidence of the particular surrounding facts, such as concealment of assets, double bookkeeping, and other avoidance techniques.<sup>173</sup> If circumstantial evidence does not exist, however, a subjective state of mind provides an almost insurmountable barrier to proving willfulness.

Outside the confines of tax practice, the Supreme Court's interpretation of the willfulness requirement could be applied to other federal offenses that contain a willfulness element.<sup>174</sup> In a review of the decision, one commentator observed that, "[t]he application of *Cheek* to other statutes may turn on whether the offense involves a complex regulatory or statutory structure

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170. See *supra* note 165 and accompanying text.

171. See *supra* notes 140-141 and accompanying text.

172. Stewart, *Supreme Court Report: Springtime for Criminals*, 77 A.B.A. J. 43 (March 1991).

173. See Note, *supra* note 82, at 1355.

174. Stewart, *supra* note 172, at 46.

imposing duties that a defendant might well understand."<sup>175</sup> Currency-reporting requirements under the banking laws and complex submissions and certification requirements of federal contractors were statutes listed as examples.<sup>176</sup> Therefore, the effect of *Cheek* will be felt by tax practitioners as well as practitioners in other highly regulated and complex legal areas, where a mere misunderstanding or ignorance of the law, no matter how unreasonable, could prevent successful criminal prosecution. The Supreme Court's holding in *Cheek* signifies a step backwards in achieving the voluntary compliance objective of the federal tax system. Courts that hear tax cases will become overrun with taxpayers asserting frivolous beliefs that they are not subject to tax in an attempt to evade criminal penalties. Enforcers of the voluntary compliance tax system must now face the added burden of trying to prove the subjective intent of the defendant. This will encourage taxpayers to escape criminal penalties by asserting outrageous "good faith" beliefs that negate the willfulness element, and with greater ability to escape criminal penalties, they may be more inclined to risk nonpayment of tax because civil penalties will be the only certain result.

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175. *Id.*

176. *Id.*